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ING Insurance Bhd v Rathinasamy a/l Kasinathan

B COURT OF APPEAL (PUTRAJAYA) — CIVIL APPEAL NO N-02–2142–10 OF 2013
LIM YEE LAN, BADARIAH SAHAMID AND VERNON ONG JJCA
15 JUNE 2017

C *Evidence — Conflicting testimony — Conflicting testimonies from plaintiff's and defendant's witnesses — Approach to take — Plaintiff's and defendant's witnesses gave contradictory evidence with regard to insured's job portfolio and income — Whether trial judge should have critically evaluated evidence to determine which version was inherently probable or improbable — Whether trial*
D *judge could not simply accept one version and reject other without giving reasons for decision — Whether a decision unsupported by any reasoning plainly wrong and could be set aside*

E *Insurance — Contract of insurance — Warranty — Insured warrantied when filling up proposal form that answers he gave in form were true and formed basis of his contract with insurer — Whether insurer entitled to repudiate a claim if any of answers were false/incorrect — Whether when dealing with policies which contained basis clause, court should not inquire into materiality of any answer in*
F *proposal form as truth of any answer was condition of policy*

The respondent, a businessman, sought the services of two insurance agents to insure five of his workers under various policies with several insurance companies and not only paid the first premium payments under those policies
G but also made sure he was named as the nominee in all the policies. One of those five workers ('the deceased') was insured for a total sum of RM1.75m under policies issued by three insurers — the appellant, Allianz and Maybank Takaful. The appellant alone insured the deceased for RM1,091,000 under four policies — life, health, personal accident and critical illness. About two
H months after the deceased was insured, he was killed in an alleged hit-and-run road accident. The person who caused the deceased's death was never found. The respondent, as the sole nominee under the deceased's policies, claimed for the insured sums from the three aforesaid insurers but they repudiated liability mainly on the ground the deceased's signature on the proposal forms had been
I forged. The respondent sued the appellant, Allianz and Maybank Takaful in the High Court to recover the insured sums. Allianz and Maybank Takaful entered into consent judgments agreeing to pay the respondent half of the insured sums under their policies but the case against the appellant proceeded to trial. One of the appellant's main defences was that the deceased had given

false or incorrect answers to questions in the proposal form which breached the 'basis clause' in the policies. Under the 'basis clause', the deceased had warrantied that all information he had disclosed in the proposal form was full, complete and true and formed the basis upon which the contract of insurance came into being. The High Court allowed the respondent's claim holding, inter alia, that: (a) the appellant had failed to prove that the deceased's signature on the original copy of the proposal form had been forged; (b) it was also not proven that the particulars of the deceased's income, employment status and name of his employer on the proposal form were false or inaccurate because the court accepted the testimony of the respondent, as the deceased's employer, that those particulars were correct; (c) the deceased's omission to state what was the nature of his employer's business was immaterial because the policy was issued in spite of that omission, hence the appellant was deemed to have waived the deceased's duty to answer that question; (d) the false answer given by the deceased with regard to the name of his employer was immaterial because it was the appellant's authorised agent who had filled up the proposal form on the deceased's behalf and the agent's knowledge about the falsity of that answer was imputed to the appellant; and (e) the court accepted the respondent's alternative submission that the appellant could not repudiate the policies just because there were inaccurate disclosures in the proposal form because it had not been proven that the deceased's answers to questions regarding his occupation, name of his employer or income were material to the risks insured under the policies. The instant appeal was against the High Court's decision.

Held, allowing the appeal and setting aside the decision of the High Court:

(1) The trial judge erred on the facts when she held that there was no inaccurate disclosure by the deceased with regard to his occupation status/job description and income in the proposal form. It was a finding that was made with no or insufficient judicial appreciation of the evidence which rendered her finding plainly wrong and justified appellate intervention to set it aside. The trial judge also erred in law in holding that the appellant had to, but did not, show how the deceased's answers with regard to his occupation status or income were material to the risks insured under the policies to entitle the appellant to repudiate the policies under the basis clause (see paras 16 & 73).

(2) In the light of the law on a 'basis clause' in an insurance policy as laid down in *China Insurance Co Ltd v Ngau Ah Kau* [1972] 1 MLJ 52 and *American International Assurance Co, Ltd v Nadarajan a/l Subramaniam* [2013] 5 MLJ 195, there was an obvious misdirection of law on the part of the trial judge. Those two authorities clearly decided that where the policy was governed by a basis clause, it was not the court's function to inquire into the materiality of any answer to a question in the proposal form. The answer given was deemed to be material as the truth of the answer had been made a condition of the policy. This court was satisfied

that the appellant had discharged its burden of proving that false or incorrect disclosure about the deceased's occupation status and income in the proposal form entitled the appellant to repudiate the policies (see paras 84–85 & 88).

(3) As there were two conflicting versions before the trial judge with regard to the income of the deceased she should have undertaken a critical evaluation of the evidence to see which version was inherently probable or improbable. The respondent's version was that when the policies were procured, the deceased was jointly appointed as manager by two enterprises owned by him and his wife (VRRP Enterprise and VRRP Plastic & Metal Trading, respectively) and was paid a monthly salary of RM6,500 as evidenced in a salary voucher originally marked as exh P1. Exhibit P1 was converted to ID1 when the respondent admitted that the signature on P1 belonged to his wife and that the voucher was created supposedly to enable the deceased to obtain a housing loan. The respondent admitted that there was no letter of appointment issued to the deceased by the two enterprises. On the other hand, the appellant's version through its witnesses, SD1, SD5, SD6 and SD8, suggested that the deceased was nothing more than a menial labourer whose job was to drive around in a lorry collecting or buying scrap metal and plastic and that he was paid a daily commission of RM20 to RM30 and that his total income could only have been around RM2,500 per month. If the trial judge had properly directed herself on the two versions placed before her, she would have found and concluded that the respondent's version was obviously untenable or inherently improbable (see paras 59–61, 63, 66 & 72).

(4) ID1 did not show any deduction for SOCSO, EPF or income tax from the deceased's salary. The income tax returns of VRRP Enterprise and VRRP Plastic & Metal Trading did not disclose the salaries of the deceased and his other workers. The combined monthly income of the two business enterprises was around RM10,000 to RM15,000 while their yearly profit was around RM60,000 only. It was therefore most unlikely that the two enterprises would have been able to pay the deceased a salary that was more than half of their monthly income. Based on their investigations, the appellant's witnesses testified that the deceased was paid in cash; that he had no bank account and never paid any income tax; that he did not own a mobile phone or any vehicle, lived in a rented house with some others with the barest of necessities, walked to his work place, moved around on a borrowed motorcycle and his job was to drive around in a lorry to collect/buy scrap metal and plastic to earn a daily commission of RM20 to RM30. In the light of this factual matrix, the trial judge ought to have treated the respondent's evidence with more caution than she did, considering that as he was the nominee under the policies he was a witness with a motive of his own to advance.

The trial judge ought to have tested the veracity or credibility of the respondent's version, which was based on his unsubstantiated bare oral testimony against the overall testimony of the appellant's witnesses, and to have asked herself which version was inherently probable or improbable. She did not carry out any of those tasks but accepted the respondent's oral evidence on the income of the deceased and did not explain why she rejected the testimony of the appellant's witnesses on the deceased's occupation status and income (see paras 67–71).

(5) By all accounts, it appeared that the respondent did not come to court with clean hands. From the notes of proceedings, he appeared to be less than forthright on how he came to be named as a nominee under the policies. He claimed he was unaware that the deceased and his other workers had named him as their nominee in their policies and only knew about that fact after the deceased's death and on being informed by the insurance agent. This was in marked contrast to SD2's testimony that he sold policies to the respondent's four other workers and that in each case, the respondent played a pivotal role when it came to procuring the facts and figures to be inserted into the policies; that the respondent paid the initial premiums on behalf of the insured persons and insisted that he was made the nominee in all the policies and that the policies were handed over to him upon their issuance (see paras 95–96).

Obiter:

The respondent could not use the monies paid out to him under the policies at his whim and fancy. As he had no familial ties with the deceased, the respondent fell under s 167(1) of the Insurance Act 1996 which provided that as a nominee he received the policy monies payable on the death of the deceased as an executor and not solely as a beneficiary and that any payment to him under the policies formed part of the estate of the deceased and was subject to his debts. As an executor of the deceased's estate, the respondent's duties were governed by the Probate and Administration Act 1959 (see paras 91–94).

[Bahasa Malaysia summary

Pihak responden, seorang peniaga, telah mendapatkan khidmat dua agen insuran untuk menginsurankan lima orang pekerjanya di bawah pelbagai polisi dengan beberapa syarikat insuran dan bukan sahaja telah membayar bayaran premium yang pertama di bawah polisi tersebut tetapi juga telah memastikan yang beliau dinamakan sebagai penama dalam kesemua polisi tersebut. Salah seorang daripada lima pekerja itu ('si mati') telah diinsurankan bagi suatu jumlah sebanyak RM1.75 juta di bawah polisi yang dikeluarkan oleh tiga penanggung insuran — perayu, Allianz dan Maybank Takaful. Perayu sahaja menginsurankan si mati bagi jumlah RM1,091,000 di bawah empat polisi — nyawa, kesihatan, kemalangan jiwa dan penyakit kritikal. Lebih kurang dua bulan selepas si mati diinsurankan, si mati telah terbunuh dalam suatu kemalangan langgar lari. Orang yang menyebabkan kematian si mati tidak

pernah dijumpai. Pihak responden, sebagai penama tunggal di bawah polisi si mati, menuntut jumlah yang diinsurankan daripada ketiga-tiga penanggung insuran yang dinyatakan sebelum ini tetapi ketiga-ketiga penanggung insuran itu telah menafikan liabiliti secara dasarnya atas alasan bahawa tandatangan si mati dalam borang tawaran telah dipalsukan. Pihak responden telah menyaman perayu, Allianz dan Maybank Takaful di Mahkamah Tinggi bagi mendapatkan kembali jumlah yang diinsuranskan. Allianz dan Maybank Takaful telah memasukkan penghakiman persetujuan dengan bersetuju untuk membayar kepada responden separuh daripada jumlah yang diinsuranskan di bawah polisi namun perbicaraan terhadap kes dengan perayu diteruskan. Salah satu daripada pembelaan utama perayu ialah si mati telah memberikan jawapan palsu atau tidak tepat terhadap soalan dalam borang tawaran yang telah melanggar 'klausa asas' dalam polisi. Di bawah 'klausa asas', si mati telah mengesahkan bahawa semua maklumat yang dinyatakan dalam borang tawaran itu merupakan maklumat penuh, lengkap dan benar dan merupakan asas bagi pembentukan kontrak insuran itu. Mahkamah Tinggi membenarkan tuntutan responden dengan memutuskan, antaranya: (a) perayu telah gagal membuktikan bahawa tandatangan si mati pada borang tawaran yang asal telah dipalsukan; (b) tidak dibuktikan bahawa butir-butir mengenai pendapatan, status pekerjaan dan nama majikan si mati pada borang tawaran adalah palsu atau tidak tepat kerana mahkamah menerima keterangan responden, sebagai majikan si mati, bahawa semua butir-butir itu adalah benar betul; (c) peninggalan si mati untuk menyatakan keadaan perniagaan majikannya adalah tidak material kerana polisi telah dikeluarkan walaupun peninggalan telah berlaku, maka perayu disifatkan telah melepaskan tanggungjawab si mati untuk menjawab soalan; (d) jawapan palsu yang diberikan oleh si mati berkenaan dengan nama majikannya adalah tidak material kerana pihak agen perayu yang telah mengisi borang tawaran itu bagi pihak si mati dan pengetahuan agen itu tentang kepalsuan jawapan itu dikaitkan dengan perayu; dan (e) mahkamah menerima hujahan alternatif responden bahawa perayu tidak boleh menolak polisi itu hanya kerana terdapat penzahiran yang tidak tepat dalam borang tawaran kerana tidak dibuktikan bahawa jawapan si mati kepada soalan berkenaan dengan pekerjaan, nama majikan atau pendapatan adalah material kepada risiko yang diinsuranskan di bawah polisi itu. Rayuan ini adalah terhadap keputusan Mahkamah Tinggi itu.

Diputuskan, membenarkan rayuan dan mengenepikan keputusan Mahkamah Tinggi:

(1) Hakim bicara telah terkhilaf dari segi fakta apabila memutuskan bahawa tidak terdapat penzahiran yang tidak tepat oleh si mati berkenaan dengan status pekerjaan/perihalan tugas dan pendapatan dalam borang tawaran. Ia adalah suatu dapatan yang dibuat tanpa penilaian ke atas keterangan atau dibuat dengan penilaian ke atas keterangan yang tidak mencukupi yang menyebabkan dapatannya ternyata salah dan mewajarkan campur

tangan rayuan untuk mengenepikannya. Hakim bicara juga terkhilaf dari segi undang-undang apabila memutuskan bahawa perayu perlu menunjukkan bahawa jawapan si mati berkenaan dengan status pekerjaannya atau pendapatannya adalah material kepada risiko yang diinsuranskan di bawah polisi untuk melayakkan perayu untuk menolak polisi di bawah klausa asas, tetapi tidak ditunjukkan oleh perayu (lihat perenggan 16 & 73).

(2) Berdasarkan undang-undang mengenai 'klausa asas' dalam suatu polisi insuran sebagaimana yang diputuskan dalam kes *China Insurance Co Ltd v Ngau Ah Kau* [1972] 1 MLJ 52 dan *American International Assurance Co, Ltd v Nadarajan a/l Subramaniam* [2013] 5 MLJ 195, terdapat salah arah undang-undang yang nyata oleh hakim bicara. Dua kes tersebut jelas memutuskan bahawa jika polisi tertakluk kepada klausa asas, bukanlah tugas mahkamah untuk menyiasat sama ada apa-apa jawapan kepada suatu soalan dalam borang tawaran itu adalah material atau tidak. Jawapan yang diberikan disifatkan sebagai material kerana jawapan yang benar merupakan syarat kepada polisi itu. Mahkamah ini berpuas hati bahawa perayu telah melepaskan beban untuk membuktikan bahawa penzahiran yang palsu atau tidak betul tentang status pekerjaan dan pendapatan si mati dalam borang tawaran itu melayakkan perayu untuk menolak polisi itu (lihat perenggan 84–85 & 88).

(3) Oleh sebab terdapat dua versi di hadapan hakim bicara berkenaan dengan pendapatan si mati, hakim bicara sepatutnya membuat suatu penilaian yang kritikal terhadap keterangan untuk menentukan versi yang manakah yang barang kali berkemungkinan atau tidak. Versi responden adalah apabila polisi diperolehi, si mati telah dilantik secara bersesama sebagai pengurus oleh dua perusahaan yang dimiliki oleh si mati dan isterinya (VRRP Enterprise dan VRRP Plastic & Metal Trading masing-masing) dan dibayar gaji bulanan sebanyak RM6,500 sebagaimana yang ditunjukkan dalam baucar gaji yang ditandakan sebagai eksh P1. Ekshibit P1 telah ditukarkan kepada ID1 apabila responden mengakui bahawa tandatangan pada P1 merupakan tandatangan isterinya dan baucar itu dibuat bagi membolehkan si mati mendapatkan pinjaman perumahan. Pihak responden juga mengakui bahawa tidak terdapat surat pelantikan yang dikeluarkan kepada si mati oleh kedua-dua perusahaan itu. Versi perayu pula, melalui saksinya, SD1, SD5, SD6 dan SD8, menunjukkan bahawa si mati hanyalah seorang pekerja buruh yang tugasnya adalah untuk memandu lori dan mengutip atau membeli besi buruk dan plastik dan si mati dibayar komisen harian sebanyak RM20 ke RM30 dan jumlah pendapatannya berkemungkinan hanya boleh mencecah RM2,500 sebulan. Sekiranya hakim bicara telah dengan sewajarnya mengarahkan dirinya kepada kedua-dua versi yang ada dihadapannya, beliau akan menemui dan menyimpulkan bahawa versi responden dengan jelas tidak dapat dipertahankan atau barang kali

berkemungkinan (lihat perenggan 59–61, 63, 66 & 72).

(4) ID1 tidak menunjukkan apa-apa penolakan bagi SOCSO, EPF atau cukai pendapatan daripada gaji si mati. Penyata cukai pendapatan VRRP Enterprise dan VRRP Plastic & Metal Trading tidak menzahirkan gaji si mati dan pekerja lain. Jumlah pendapatan bulanan yang digabungkan bagi kedua-dua perusahaan itu adalah sekitar RM10,000 ke RM15,000 manakala pendapatan tahunan adalah sekitar RM60,000 sahaja. Maka tidak mungkin kedua-dua perusahaan itu mampu membayar gaji si mati yang berjumlah lebih separuh daripada pendapatan bulanan mereka. Berdasarkan siasatan mereka, saksi perayu menyatakan bahawa si mati dibayar secara tunai; si mati tidak mempunyai akaun bank dan tidak pernah membayar apa-apa cukai pendapatan; si mati tidak memiliki telefon bimbit atau apa-apa kenderaan, tinggal di sebuah rumah sewa dengan beberapa orang lain dengan kelengkapan yang sangat sedikit, berjalan kaki ke tempat kerja, bergerak menggunakan motorsikal yang dipinjam dan tugasnya adalah memandu lori untuk mengutip/membeli besi buruk dan plastik bagi mendapat komisen harian berjumlah RM20 ke RM30. Berdasarkan fakta matriks ini, hakim bicara sepatutnya menerima keterangan responden dengan lebih berhati-hati, dengan mengambil kira bahawa responden merupakan penama di bawah polisi itu, responden merupakan seorang saksi yang mempunyai kepentingan peribadi untuk menuntut. Hakim bicara sepatutnya mempertimbangkan kebenaran atau kredibiliti versi responden, yang hanya berdasarkan kepada keterangan lisan semata-mata berbanding keterangan keseluruhan saksi perayu, dan bertanyakan kepada dirinya sendiri versi manakah yang barang kali berkemungkinan atau tidak. Hakim bicara tidak melakukan mana-mana tugas berikut tetapi telah menerima keterangan lisan responden tentang pendapatan si mati dan tidak menjelaskan mengapa beliau menolak keterangan saksi perayu tentang status pekerjaan dan pendapatan si mati (lihat perenggan 67–71).

(5) Walau apapun, pihak responden jelas hadir ke mahkamah tidak secara suci hati. Berdasarkan nota prosiding, pihak responden tidak benar-benar menjelaskan bagaimana beliau boleh dinamakan sebagai penama di bawah polisi itu. Responden menyatakan bahawa beliau tidak tahu yang si mati dan pekerjanya yang lain telah menamakan beliau sebagai penama dalam polisi mereka dan hanya tahu tentang fakta itu selepas kematian si mati dan selepas diberitahu oleh agen insuran. Ini amat jelas bertentangan dengan keterangan SD2 yang beliau menjual polisi itu kepada empat pekerja responden yang lain dan dalam setiap kes, pihak responden memainkan peranan yang penting dalam memperolehi fakta dan angka untuk dimasukkan dalam polisi; pihak responden membayar premium pendahuluan bagi pihak orang yang diinsuranskan dan mendesak supaya beliau dijadikan sebagai penama bagi kesemua

polisi dan polisi tersebut diserahkan kepada responden apabila dikeluarkan (lihat perenggan 95–96).

Obiter:

Pihak responden tidak boleh menggunakan wang yang dibayar kepadanya di bawah polisi tersebut berdasarkan kehendak dan keinginannya. Oleh sebab responden tidak mempunyai hubungan kekeluargaan dengan si mati, pihak responden tertakluk kepada s 167(1) Akta Insurans 1996 yang menyatakan bahawa sebagai seorang penama beliau menerima wang polisi yang kena dibayar atas kematian si mati hanya sebagai pelaksana dan bukan sebagai benefisiari dan apa-apa bayaran kepada responden di bawah polisi tersebut merupakan sebahagian daripada harta pusaka si mati dan tertakluk kepada hutangnya. Sebagai pelaksana kepada harta pusaka si mati, tugas responden adalah tertakluk kepada Akta Probet dan Pentadbiran 1959 (lihat perenggan 91–94).

Notes

For cases on conflicting testimony in general, see 7(1) *Mallal's Digest* (5th Ed, 2017 Reissue) paras 1187–1215.

For cases on warranty, see 8 *Mallal's Digest* (5th Ed, 2017 Reissue) paras 92–94.

Cases referred to

Ahmad Najib bin Aris v Public Prosecutor [2009] 2 MLJ 613; [2009] 2 CLJ 800, FC (refd)

American International Assurance Co, Ltd v Nadarajan a/l Subramaniam [2013] 5 MLJ 195; [2013] 5 CLJ 697, CA (refd)

Anderson v Fitzgerald (1853) 4 HL Cas 484, HL (refd)

Armagas Ltd v Mundogas SA, The Ocean Frost [1985] 1 Lloyd's Rep 1, QBD (refd)

China Airlines Ltd v Maltran Air Corp Sdn Bhd (formerly known as Maltran Air Services Corp Sdn Bhd) and another appeal [1996] 2 MLJ 517; [1996] 3 CLJ 163, FC (refd)

China Insurance Co Ltd v Ngau Ah Kau [1972] 1 MLJ 52; [1971] 1 LNS 171, FC (refd)

Duckett v Williams (1834) 2 C & M 348 (refd)

Eastern & Oriental Hotel (1951) Sdn Bhd v Ellarious George Fernandez & Anor [1989] 1 MLJ 35, FC (refd)

Eng Thye Plantations Bhd v Lim Eng Hock & Ors [2001] 4 MLJ 26; [2001] 4 CLJ 245, CA (refd)

Gan Yook Chin (P) & Anor v Lee Ing Chin @ Lee Teck Seng & Ors [2005] 2 MLJ 1, FC (refd)

Guan Teik Sdn Bhd v Haji Mohd Noor bin Haji Yakob & Ors [2000] 4 MLJ 433, FC (refd)

Lee Ing Chin @ Lee Teck Seng & Ors v Gan Yook Chin & Anor [2003] 2 MLJ 97, CA (refd)

Leong Kum Whay v QBE Insurance (M) Sdn Bhd & Ors [2006] 1 MLJ 710; [2006] 1 CLJ 1, CA (refd)
New India Assurance Co Ltd v Pang Piang Chong & Anor [1971] 2 MLJ 34 (refd)
Pacific & Orient Insurance Co Sdn Bhd v Kathirvelu [1992] 1 MLJ 249; [1992] 1 CLJ 251, SC (refd)
Siaw Kim Seong v Siew Swee Yin (f) & Anor [2009] 1 MLJ 349, CA (refd)
Sivalingam a/l Periasamy v Periasamy & Anor [1995] 3 MLJ 395; [1996] 4 CLJ 545, CA (refd)
Tindok Besar Estate Sdn Bhd v Tinjar Co [1979] 2 MLJ 229, FC (refd)
Toh Kim Lian & Anor v Asia Insurance Co Ltd [1996] 1 MLJ 149; (1995) 3 AMR 2304, HC (refd)

Legislation referred to

Insurance Act 1996 (repealed by Financial Services Act 2013) ss 147(4), (5), 150(3), 151(1), 166, 167, 167(1)
Probate and Administration Act 1959

Sreether a/l Shanmuga Sundaram (Murali B Pillai & Assoc) for the appellant.
Pushpakantha a/p K Subramaniam (P Subramaniam & Assoc) for the respondent.

Lim Yee Lan JCA:

INTRODUCTION

[1] This appeal is against the decision of the Seremban High Court dated 21 August 2013 in allowing the respondent's claim as nominee of one Devadas a/l Anthony Samey ('the deceased') under four policies issued to the deceased by the appellant.

[2] The respondent was the plaintiff and the appellant the defendant at the High Court. For ease of reference parties will be referred to as they were in the High Court.

BRIEF FACTS

[3] The facts in this case are very simple. Approximately two months before his death, the deceased took out insurance policies with three companies, namely the defendant in the sum of RM1,086,000, Allianz in the sum of RM500,000 and Maybank Takaful in the sum of RM150,000, making a total insured value of approximately RM1.75m.

[4] The policies issued by the defendant to the deceased were as follows:

Policy No	Maturity Date	Type of Coverage	Insured Sum (RM)
2232852A-01–075	February 2064	Life	30,000
2232852B-01–075	February 2049	Critical Illnesses	50,000
2232852C-08–075	February 2049	Personal Accident	1,006,000
2232852E-04–075	February 2049	Health	5,000
Total	1,091,000		

('the policies').

[5] In all the policies with the three companies the plaintiff was named as the nominee.

[6] On 4 April 2007 the deceased was apparently killed in a hit and run accident involving a lorry while riding a motorcycle borrowed from a co-worker. The driver of the lorry that was allegedly involved in the accident was never found.

[7] The plaintiff, in his capacity as the nominee in all the policies, filed his claim for the insured sum with the three insurance companies.

[8] However, all three insurance companies, relying on the opinion of two different handwriting experts, repudiated the respective policies on the main ground that the deceased's signature on the proposal form was not his genuine signature.

[9] The plaintiff then filed three separate suits claiming for the insured sums against the three insurance companies at the Seremban High Court. The suits were subsequently consolidated.

[10] Allianz and Maybank Takaful subsequently entered into a consent judgment with the plaintiff for the sum of RM250,000 and RM75,000 respectively. The suit against the defendant went on for full trial.

DEFENCE

[11] At the High Court, the main defences ran by the defendant to repudiate the policies were: (1) fraud ie collusion or connivance between the deceased and the insurance agent who sold the policies to the deceased, identified as SD7 during the trial; (2) false or incorrect answers to questions in the proposal form furnished by the deceased which breached the basis clause in the policies; and (3) forgery of the deceased's signature on the summary information sheet, nomination form and proposal form, all of which rendered the policies null

and void and unenforceable against the defendant.

[12] During the trial, the plaintiff called two witnesses, ie the plaintiff himself (as SP1) and the deceased's co-worker and housemate by the name of Vijayakumar a/l Muniandy as SP2 while the defendant called nine witnesses (SD1 to SD9) to prove their respective case and defence.

HIGH COURT DECISION

[13] At the end of the trial the learned High Court judge dismissed the defendant's defence and allowed the plaintiff's claim and awarded to the plaintiff the insured sum of RM1,091,000 under the policies together with interests and costs.

[14] Briefly, the decision of the learned High Court judge ('learned trial judge') was premised on the following grounds:

(a) the defendant had abandoned the defence of fraud in its submission at the end of the trial. Consequently, fraud is no longer an issue to be determined;

(b) in any case, the court was of the view that the defendant failed to prove any collusion or connivance between the deceased and SD7. The defendant did not make any police report against SD7 upon becoming aware of the alleged collusion or connivance and, most importantly, SD7's appointment as defendant's agent was never terminated until the present day;

(c) there was no concrete evidence of forgery of deceased's signature on the original proposal form. The court could not rely on the evidence of Mr Siow Kwen Sia, the hand writing expert ('SP9'), because he did not examine the original copy of the proposal form. What SP9 examined was the amended proposal form in which SD7 had forged the signature of the deceased after amending the errors in his IC numbers which he had the permission of the deceased to do so;

(d) the court accepted the testimony of SD7 that while he did forge the deceased's signature on the summary information sheet and the nomination form, he did not however forge the deceased's signature on the original proposal form. The court found SD7 a consistent witness who did not waver in his testimony even during his cross-examination despite being treated as a hostile witness by defence counsel;

(e) the defendant failed to prove that the particulars on the income, employment status and name of deceased's employer on the proposal form were false or inaccurate;

(f) on question 9 relating to 'occupation' where the deceased had answered as 'manager', the court accepted the plaintiff's testimony that he had notified SD7 that he appointed the deceased as manager of his enterprise because the deceased was a responsible person and could be depended upon to manage his business whenever he was away;

(g) in regard to question 10(a) on 'nature of employer's business' where the deceased had left it blank, the court was of the view that since the defendant had accepted the answers of the deceased as a package and had proceeded to issue the policies to the deceased despite there being no answer to this question, the defendant was deemed to have waived the duty to disclose this answer by the deceased;

(h) in this regard, the court relied on s 150(3) of the Insurance Act 1996 which provides as follows:

> 150 — duty of disclosure.
>
> (1) ...
>
> (2) ...
>
> (3) Where a proposer fails to answer or gives an incomplete or irrelevant answer to a question contained in the proposal form or asked by the licensed insurer and the matter was not pursued further by the licensed insurer, compliance with the duty of disclosure in respect of the matter shall be deemed to have been waived by the licensed insurer.

(i) on question 10(b) regarding the name of employer, the deceased had answered as 'Samy Metal Trading Sdn Bhd'. The plaintiff in his testimony admitted that this answer was not correct because this entity had ceased operation even before the policies were procured. Nevertheless, the court is of the view that this is not a valid reason for the defendant to deny the plaintiff's claim for the following reasons:

  (i) SD7 admitted that the proposal form was filled up by him;

  (ii) he filled up the proposal form based on the business card of Samy Metal Trading given by the deceased without the words 'Sdn Bhd'; and

  (iii) he did not question the deceased on his occupation;

(j) in this regard the court would rely on s 151(1) of the Insurance Act which provides that any knowledge acquired by the authorised agent of an insurer would be deemed to be the knowledge of the insurer;

(k) in this case, despite knowing the inaccuracy regarding the name of the deceased's 'employer' on the proposal form through its authorised agent, the defendant had proceeded to accept the premium and issue the policies to the deceased. Consequently, by virtue of s 151(1) of the

Insurance Act, the defendant was deemed to have waived its right to repudiate the policy based on the said inaccuracy;

(l) in regard to the deceased's answer to question 12 that his annual income is between RM72,000 to RM120,000, this fact was confirmed by the plaintiff who in his testimony explained that the monthly salary of the deceased plus commission was between RM5,000 to RM7,000. The court therefore rejects the contention of the defendant that there was an inaccuracy concerning the salary of the deceased on the proposal form to entitle the defendant to repudiate the policy;

(m) in any event, the court accepted the alternative submission of learned counsel for the plaintiff that even if there was any inaccurate disclosure by the deceased on the proposal form, the defendant was nevertheless not entitled to repudiate the policies because the defendant failed to adduce any evidence through any of its witnesses to prove that the deceased's answers on his occupation status, name of his employer or his income were material to the risk insured in the policies; and

(n) the court's finding is supported by the fact that Allianz had entered into a consent judgment with the plaintiff despite the fact that the column for salary/income of the deceased in the proposal form was left blank. This goes to prove that the income of the deceased was not material to the risk to be insured.

OUR DECISION ON THE APPEAL

[15] At the conclusion of the hearing, having considered the submissions of respective learned counsels and perused the records of appeal, we allowed the defendant's appeal with costs and set aside the decision and order of the High Court. We were of the considered opinion that the learned trial judge erred on the law and the facts in regards to the effect of a basis clause in a contract of insurance which warranted our appellate intervention to set aside her decision and order. The plaintiff has applied for leave to appeal to the Federal Court against our decision. We now set out the reasons for our decision in the following paragraphs.

REASONS FOR THIS COURT'S DECISION

[16] This court's decision in allowing the appeal was premised on two grounds, firstly, that the learned trial judge erred on the facts when she held that there was no inaccurate disclosure by the deceased with regard to his occupation status/job description and his income on the proposal form and secondly, that she erred in law in holding that the defendant had to show how the deceased's answers regarding his occupation status or income were material to the risk insured in the policies which would entitle them to repudiate the

policies under the basis clause, which the defendant had failed to do so.

BASIS CLAUSE AND ITS EFFECT IN LAW

[17] In this case it is not disputed that the proposal form, which subsequently formed part of the polices issued to the deceased, contained a clause in Part 10(a)(i) of the proposal form which reads as follows:

> We warrant that *all statements and answers in this application* AND those stated/disclosed in any required medical examination, questionnaire or amendments *are full, complete and true and shall constitute the entire contract between the parties hereto*. I/We understand that the Company will rely on all statements and answers given. I/We warrant that I/we have not withheld any information which might influence the acceptance of this proposal. *This warranty shall be the basis of contract with the company*.

[18] Before us, learned counsel for the defendant ('the defendant's counsel') contended that the said clause in Part 10(a)(i) of the proposal form is what is known in insurance law as a *basis clause*, ie where all the answers given in the proposal form formed the *basis* of the contract between the insurer and the insured and if any of the answers are false or untrue, the *basis* of the contract fails and the insurer is entitled to repudiate the insured's claim, reliance being placed, inter alia, on the decisions in the cases of *China Insurance Co Ltd v Ngau Ah Kau* [1972] 1 MLJ 52; [1971] 1 LNS 171 (FC) and *American International Assurance Co, Ltd v Nadarajan a/l Subramaniam* [2013] 5 MLJ 195; [2013] 5 CLJ 697 (CA).

[19] In the case of *China Insurance Co Ltd v Ngau Ah Kau*, the Federal Court held that in every case the issue whether there was a non-disclosure or incorrect disclosure or misrepresentation in an answer in the proposal form is a question of fact to be determined by the court and where the policy contains a basis clause, it was not the court's function to inquire into the materiality of the answer. The answer to the question in the proposal form will be deemed material as the truth of the answer had been made a condition of the policy.

[20] It was submitted that this position of the law on a basis clause was reaffirmed by this court in the recent decision of this court in *American International Assurance Co, Ltd v Nadarajan a/l Subramaniam* in which the facts are strikingly similar to the facts in this case.

[21] In that case, the insured purchased three personal accident insurance policies and in all three proposal forms, the insured stated that his estimated annual income to be RM150,000 and described himself as 'a self-employed managing proprietor of a business selling and buying oil palm bunches'. Subsequent to the insured's death, the respondent's claim under the policies, as

A the beneficiary, was declined by the appellant on the ground that the cause of death of the insured was due to an illness whilst the purported personal accident policies only covered accidental death sustained as a result of 'bodily injury effected directly and independently of all other causes by accident'. The respondent therefore commenced an action in the High Court which decided B in favour of the respondent and hence this appeal by the appellant. The issues for determination in the appeal were: (a) whether there was material non-disclosure by the insured; and (b) whether the insured's demise was an accidental death or due to illness.

C

[22] Mah Weng Kwai JCA delivering the judgment of the court held as follows:

(1) While there was no incorrect disclosure or misrepresentation of an actual fact when the insured described himself as being 'self-employed (Managing Proprietor) D in the selling and buying of oil palm bunches', there was a material non-disclosure or incorrect disclosure when the insured stated in the proposal forms that his estimated annual income was RM150,000 when in fact, he was only earning an annual income of about RM50,000 (paras 20 & 22).

(2) Part IV of the insurance policies clearly stated that the proposal forms shall be E the basis of the insurance policies. The insured was therefore bound by the warranty in each of the three proposal forms that the answers given were true and that the answers would form the basis of the contract between the insured and the appellant. In the case of *Pacific & Orient Insurance Co Sdn Bhd v VR Kathirvelu*, the court was not concerned with the 'basis clause' when concluding that the non-disclosure was F not material, whereas in the instant case, the 'basis clause' was applicable to the contract of insurance entered into between the insured and the appellant (*China Insurance Co Ltd v Ngau Ah Kau*; folld) (paras 23 & 28).

(3) The issue of whether there was a non-disclosure or incorrect disclosure or misrepresentation in an answer in the proposal form is a question of fact to be G determined by the court. In light of the decision in *China Insurance Co Ltd v Ngau Ah Kau*, it was not the court's function to inquire into the materiality of the answer. The answer to the question in the proposal form will be deemed material as the truth of the answer had been made a condition of the policy. In the circumstances, the appellant had discharged its burden of proving the allegation of non-disclosure H or incorrect disclosure of a material fact in the proposal form (paras 28 & 30).

[23] Reference was also made to the English case of *Anderson v Fitzgerald* (1853) 4 HL Cas 484 in which it was held that where there is a basis of contract clause, the insurer is entitled to avoid the contract ab initio if there was any I inaccurate or incorrect statement in the proposal form that was material to the policy.

[24] In another English case of *Duckett v Williams* (1834) 2 C & M 348, the court went even further to hold that an insurer is entitled to avoid the policy if

the statement is factually untrue even if the insured is not aware that the statement is untrue.

[25] Having considered the aforesaid authorities referred to by the defendant's counsel, we accept the proposition of law laid down therein concerning a basis clause found in contracts of insurance.

[26] In this connection, we would also refer to the book entitled *Principles of Insurance Law* (6th Ed), published by LexisNexis, in which the learned author Poh Chu Chai had also explained at p 237 what is a basis clause and how it operates in an insurance contract:

> A proposer who applies for an insurance policy is under a duty to disclose to an insurer all information considered to be material by a prudent insurer. In addition to an insured's duty to disclose material information, an insurer may also elicit material information from an insured through the questions in a proposal form. In a proposal form, an insured is required to make statements of fact and sometimes also statements of opinion pertaining to the risk to be insured. *An insured is invariably made to warrant the truth of the statements given in the proposal form. This is done by incorporating what is popularly known as the basis clause.* A typical basis clause reads as follows (see *Lee v British Law Insurance Co Ltd* [1972] 2 Lloyd's Rep 49):
>
> > I warrant that the above statements made by me or on my behalf are true and complete and I agree that this proposal shall be the basis of the contract between me and the company
>
> The use of a basis clause is by far the most common way warranties are created in an insurance contract. *When an insured warrants the truth or accuracy of the statements given in a proposal form, the insurer is entitled to avoid the contract ab initio if the statements are inaccurate even though they have no effect on the insured risk. The insurer is not obliged to show any causal link between the misstatement and the loss which takes place. Equally, if there is a misstatement in a proposal form containing a basis clause, the insurer is also not obliged to show that the misstatement constitutes a fact material to the risk insured, namely, that the information would have influenced a prudent insurer in his decision whether to take on the risk or the amount of premium to be charged for undertaking the risk*. (See *Dawsons, Ltd v Bonnin and Others* [1922] 2 AC 413 and *Mackay v London General Insurance Co Ltd* (1935) 51 Ll L Rep 201).

Also at p 239 as follows:

> *In Malaysia, the right of a life insurer to rely on a misstatement in a proposal is restricted two years after the policy is effected. After a lapse of two years, a life insurer can only rely on a misstatement if he is able to show that it related to a material matter and the proposer made the statement fraudulently with the knowledge that the statement was false or intended to suppress a material fact.* Section 147(4) and (5) of the Insurance Act 1996 read as follows:
>
> > (4) A licensed life insurer shall not dispute the validity of a life policy after the expiry of two years from the date on which it was effected on the ground that a

A statement made or omitted to be made in the proposal for insurance or in a report of a doctor, referee, or any other person, or in a document leading to the issue of the life policy, was inaccurate or false or misleading unless the licensed life insurer shows that the statement was on a material matter or suppressed a material fact and that it was fraudulently made or omitted to be made by the
B policy owner.

(5) For the purpose of subsection (4), 'material matter' or 'material fact' means a matter or fact which, if known by the licensed life insurer, would have led to its refusal to issue a life policy to the policy owner or would have led it to impose terms less favourable to the policy owner than those imposed in the life policy.

C

[27] We noted that in the present case, the deceased died within two months after the enforcement of the policies. Therefore s 147(4) of the Insurance Act (which was the statute in force on the date of the issuance of the policies) has no relevance.

D

WERE THERE INACCURATE DISCLOSURES ON THE PROPOSAL FORM?

[28] Having established what is a basis clause in the context of a contract of
E insurance, we now turn to the next issue, which is really a question of fact, that is, was there any false or inaccurate answers given by the deceased on the proposal form which would entitle the defendant to repudiate the policies on the ground the deceased had breached the basis clause?

F

[29] It is not disputed that the policies here were procured through a proposal form in which the deceased was required to answer certain questions. The defendant's complaint relates to the deceased's answers found in questions 9, 10(b) and 12 on the proposal form. The answers given by the deceased to these questions read as follows:

G

Para 9: Occupation:	Manager
Para 10(b): Name of Employer:	Samy Metal Trading Sdn Bhd
Para 12: Annual Income:	RM72,000 to RM120,000

H **[30]** It was submitted by the defendant's counsel that all the answers to the afore mentioned in the proposal form were false or untrue and outright lies.

[31] With regard to the deceased's position as a manager in Samy Metal Trading Sdn Bhd, the plaintiff, who claimed to be the employer of the
I deceased, had admitted during his examination-in-chief that there was no letter of employment to prove that the deceased was a 'manager' as claimed and that 'Samy Metal Trading Sdn Bhd' which was supposedly the deceased's employer was no longer in business at the time the deceased filled up the proposal form.

[32] With regard to question 12 on annual income, it was also submitted that the only documentary evidence to prove the deceased's income was a salary voucher allegedly signed by the plaintiff and issued to the deceased showing the amount of his monthly income as RM6,500. The salary voucher was originally marked as exh P1 but was reverted to ID1 by the court after the plaintiff admitted during cross-examination that the signature on the said voucher was not his but his wife's who was not called as a witness during the trial.

[33] ID1 was the sole document that was produced to prove that the deceased was allegedly earning RM6,500 per month. The said document did not show any deductions for EPF, SOSCO or income tax on behalf of the deceased. The plaintiff, who claimed to be the employer of the deceased together with his wife (through their respective business enterprises, ie VRRP Enterprise and VRRP Plastic and Metal Trading respectively) also admitted that the income tax return forms for VRRP Enterprise and VRRP Plastic and Metal Trading made no reference to the deceased being paid this salary. All these evidences collectively proved that the deceased's salary voucher in ID1 was a sham.

[34] The defendant, on the other hand, called a number of witnesses to prove that the answers regarding the deceased's position as manager and his annual income as between RM72,000 to RM120,000 in the proposal form, were false answers.

[35] These witnesses were Mr Louis Anton, an independent investigator ('SD1'), Mr Ganaraj, defendant's manager of investigation ('SD5'), Ms Ramani Kanthasamy, defendant's former senior supervisor ('SD6') and Ms Goh Chet Kee, defendant's manager, Life Benefits Department ('SD8'), who had all independently confirmed that in their interview with the plaintiff he had confided in them that the salary voucher in ID1 had been fabricated to make up the required figure so that apparently the deceased could apply for a housing loan.

[36] These witnesses also testified that ID1 did not show any contribution or deduction for EPF, SOSCO or income tax; that before joining the plaintiff the deceased worked for a Chinese transportation company as a lorry attendant and was earning between RM500 to RM600 per month; that in April and May 2006 he worked with a company called Redza Securities Sdn Bhd as a security guard and was earning a monthly income between RM400 to RM500; that his job while working for the plaintiff was to drive around in a lorry to look for scrap metal and plastic material and was paid a daily commission of between RM20 to RM40; that a worker with a similar job description as the deceased was earning a monthly income of around RM2500.

A **[37]** The defendant had also adduced through the plaintiff's former employee and deceased's housemate, Vijayakumar a/l Muniandy ('SP2') who testified that while under the plaintiff's employ he was earning around RM35 per day which came to around RM1,000 per month.

B **[38]** The partial statement taken by Mr Ganaraj ('SD5') from an employee of the plaintiff by the name of Maniam ('SD3') also showed that Maniam was only earning RM1000 per month when he was in the plaintiff's employ.

C **[39]** Mr Ganaraj ('SD5') also testified that his investigations revealed that all the other workers in the plaintiff's employ generally earned around RM1,000 to RM1,300 a month. It was therefore highly unlikely that the deceased was drawing a salary of RM6,500 per month. The plaintiff admitted in his evidence that he only owned a Kelisa car. In all these circumstances, it was most unlikely that he could afford to pay the deceased a monthly salary of RM6,500?

D

[40] Mr Louis Anton ('SD1') also testified that his investigations revealed that the deceased lived in a house with a few other men, did not own a mobile phone nor any means of transport and used to walk one kilometer to work every day.

E

[41] SD8 also testified that the combined premiums that the deceased had to pay for all the polices procured from the defendant, Allianz and Maybank Takaful would add up to RM816 per month, which although not an inconsiderable sum to most people, was an absurdly high figure for the deceased in view of his low income and station in life.

F

[42] Hence, it was submitted, the defendant had adduced more than sufficient cogent and credible evidence to prove that the deceased could not have been holding the post of manager in RVVP Enterprise nor could he be earning an annual income of between RM72,000 to RM120,000 at the time of the procurement of the polices.

G

[43] It was submitted that since the policies issued to the deceased were subject to the basis clause, where the truth of the answers formed the basis of the contract, the false or untrue answers given by the deceased with regard to his occupation status and his annual income rendered the policies null and void ab initio which entitled the defendant to repudiate the policies.

H

I **[44]** The defendant's counsel submitted that the learned trial judge's failure to judicially appreciate the entire body of evidence adduced before her through cross-examination of the plaintiff and his witness ('SP2') and through the defendant's witnesses rendered her findings plainly wrong to justify appellate intervention of this court.

[45] Learned counsel for the plaintiff ('the plaintiff's counsel'), on the other hand, submitted before us that there was no appealable error in the findings of the learned trial judge to justify any appellate intervention.

[46] It was contended that the conclusions reached were based upon the credibility of the witnesses before her and the totality of the evidence which the learned trial judge had gone into with a fine tooth comb and her consideration of the documents against the background of viva-voce evidence.

[47] In regard to the deceased's answer in question 9 on his occupation status/employment position which was stated as 'manager', the learned trial judge was right in accepting the plaintiff's evidence during examination-in-chief at Q&A 6 wherein he had stated as follows:

S6: Mengapa anda memberi suatu jawatan Manager/Chief Supervisor kepada simati Devadas a/l Anthoney Samey?

J6: Saya menjalankan pekerjaan mengumpul Plastic dan Metal Trading dan memandangkan Devadas a/l Anthoney Samey seorang yang bertanggungjawab saya telah beri dia pekerjaan itu. Dia adalah seperti 'second man after me' sebab saya terpaksa keluar 'Travel' banyak kerap. Devadas boleh mengurus perniagaan saya tanpa kehadiran saya.

[48] With regard to the annual income of the deceased in question 12, which was stated as in the range of RM72,000 to RM120,000, again the learned trial judge was correct in finding that there was no inaccuracy in the answer of plaintiff who had during examination-in-chief at Q&A 39 stated as follows:

S39: Berapakah gaji yang telah didapati oleh En. Devadas dalam tahun 2007?

J39: Merujuk kepada muka surat 172, Ikatan B — gaji beliau ialah sebanyak RM3,200-00 dan bayaran-bayaran lain seperti pengangkutan dan elaun, semuanya berjumlah RM6,550-00. Kebiasaannya, gaji beliau dalam lingkungan RM5,000 hingga RM7,000 sebulan.

And further during cross-examination:

S61: Saya katakan kepada encik bahawa memandangkan latar belakang dan pengalaman Devadas, dia tidak layak untuk diberi jawatan pengurus di kedua-dua syarikat En Rathinasamy. Setuju atau tidak?

J61: Tidak setuju.

S62: Beliau juga tidak layak mendapat gaji yang begitu tinggi sehingga RM5,000 hingga RM7,000?

J62: Tidak setuju.

[49] Although SP1 was cross-examined over a period of not less than three days, his evidence on the income of the insured remained unshaken.

[50] Hence, the learned trial judge was right in holding that there was no misstatement or inaccuracy in the deceased's answers with regard to his job description/employment status as 'manager' and annual income as in the range of RM72,000 to RM120,000 to entitle the defendant to repudiate the policies.

OUR ANALYSIS AND FINDING

[51] In dealing with this issue, we were acutely aware of the general rule that as the appellate court we must be slow to interfere with findings of fact made by a trial judge to whom the law entrusts the task as the primary trier of facts.

[52] However, like all general rules, the rule of non-intervention on finding of fact is subject to two exceptions. The first exception is that appellate intervention will be required in a case where there was no or insufficient judicial appreciation of the entire body of evidence by the trial judge to render his or her finding plainly wrong (see: *China Airlines Ltd v Maltran Air Corp Sdn Bhd (formerly known as Maltran Air Services Corp Sdn Bhd) and another appeal* [1996] 2 MLJ 517; [1996] 3 CLJ 163 (FC); *Eng Thye Plantations Bhd v Lim Eng Hock & Ors* [2001] 4 MLJ 26; [2001] 4 CLJ 245 (CA); *Lee Ing Chin @ Lee Teck Seng & Ors v Gan Yook Chin & Anor* [2003] 2 MLJ 97 (CA); *Gan Yook Chin (P) & Anor v Lee Ing Chin @ Lee Teck Seng & Ors* [2005] 2 MLJ 1 (FC)).

[53] The second exception would be a case where one may safely say that no reasonable court similarly circumstanced which had properly directed itself and asked the right questions would have arrived at the same conclusion as the trial judge whose findings are called into question (see: *Sivalingam a/l Periasamy v Periasamy & Anor* [1995] 3 MLJ 395; [1996] 4 CLJ 545; *Siaw Kim Seong v Siew Swee Yin (f) & Anor* [2009] 1 MLJ 349; [2009] 1 MLJ 34). This exception deals with what is commonly known as failure to consider the inherent probability or improbability of a case in light of the total body of evidence adduced before the court.

[54] It is equally trite law that that in order to come to its conclusion whether either or both of the exceptions apply in a given case, an appellate court is empowered to review or re-evaluate all the evidence available on the record (see: *Ahmad Najib bin Aris v Public Prosecutor* [2009] 2 MLJ 613; [2009] 2 CLJ 800 (FC)).

[55] Applying the principles on appellate intervention as set out above, having carefully reviewed the evidence on the record, both oral and written, and having considered the oral and written submission of respective counsels,

we were inclined to agree with the defendant's counsel that both the exceptions to the general rule on non-intervention in the findings of fact of a trial judge would apply to this case. We said so for the following reasons.

[56] We must confess that we found this case to be a rather strange case in that while being asked to determine whether the deceased had lied about his income and occupation status on the proposal form, this court was also asked to look into the credibility of the plaintiff as a witness, when he was neither the proposer nor the insured of the policies. The reason, according to defendant's counsel, is this. The defendant's witnesses had through their investigation and interview with the plaintiff himself and his workers, Vijayakumar a/l Muniandy ('SP2') and Maniam ('SD3') and Mr Jeyasangkar ('SD2'), the defendant's former insurance agent and a subpoenaed witness, discovered that in reality the plaintiff was the prime mover behind the deceased and his other workers in procuring the policies from the three companies.

[57] SD2 in his testimony told the High Court that he had sold polices to four other workers of the plaintiff (by the name of Maniam, Kumar, Kumaran and Kanagarajah) and when filling up the proposal form, other than personal details, these employees would keep silent and look to the plaintiff who would provide all the particulars and details relating to their length of employment with the plaintiff and their income. The plaintiff also paid for their first premium in cash and he also insisted to be named as the nominee in all the policies.

[58] In determining the question on whether the deceased lied about his occupation status and his income on the proposal form, we had perused and reviewed the notes of proceedings in the record of appeal.

[59] We noted that it was the plaintiff's version that at the time of the procurement of the policies, the deceased was jointly appointed by two enterprises owned by him and his wife (VRRP Enterprise and VRRP Plastic & Metal Trading respectively) as manager and was paid a monthly salary of RM6,500 as evidenced in the salary voucher originally marked as exh P1. When P1 was reverted to ID1, the learned trial judge had proceeded to rely on the oral evidence of the plaintiff that the deceased's monthly income was around RM5,000 to RM7,000.

[60] We also noted that the defendant's version, through SD1, SD5, SD6 and SD8, suggested that the deceased was in reality nothing more than a menial laborer whose job was to drive around in a lorry collecting and or buying scrap metal and plastic materials and was paid a daily commission of around RM20 to RM30 and his total income, if compared to another worker of the plaintiff doing exactly the same job, would be around RM2,500 per month.

[61] In other words, there were two conflicting versions before the learned trial judge with regard to the income of the deceased.

[62] It is of course an established principle that faced with two conflicting versions before her, the learned trial judge, as a primary trier of facts, was perfectly entitled to accept one version as opposed to the other version. However, any acceptance or rejection of one version over the other must be based on a proper evaluation and weighing of the entire body of evidence before her of both parties.

[63] Indeed, when presented with two conflicting evidence by parties, it is incumbent upon the learned trial judge to undertake a critical evaluation of the sworn evidence which she had admitted including contemporaneous documentary evidence to see which version is inherently probable or improbable (see also: *Guan Teik Sdn Bhd v Haji Mohd Noor bin Haji Yakob & Ors* [2000] 4 MLJ 433; *Tindok Besar Estate Sdn Bhd v Tinjar Co* [1979] 2 MLJ 229; and *Eastern & Oriental Hotel (1951) Sdn Bhd v Ellarious George Fernandez & Anor* [1989] 1 MLJ 35).

[64] In *Eastern & Oriental Hotel (1951) Sdn Bhd v Ellarious George Fernandez & Anor*, the Federal Court quoted with approval the observation made in the English case of *Armagas Ltd v Mundogas SA, The Ocean Frost* [1985] 1 Lloyd's Rep 1 which reads:

> It is frequently very difficult to tell whether a witness is telling the truth or not; *and where there is a conflict of evidence such as there was in the present case, reference to the objective facts and documents, to the witness' motives and to the overall probabilities, can be of very great assistance to a judge in ascertaining the truth.*

[65] This principle was reinforced in the case of *Guan Teik Sdn Bhd v Haji Mohd Noor bin Haji Yakob & Ors* in which the Federal Court held:

> ...
>
> Nevertheless the learned trial Judge expressed himself to be completely satisfied with the veracity of the respondent's witnesses and their evidence. He purported to come to certain findings of fact on the oral evidence but did not notice or consider that the respondent's oral evidence openly clashed with its contemporaneous documentary evidence. *For myself, I would with respect feel somewhat safer to refer to and rely on the acts and deeds of a witness which are contemporaneous with the event and to draw the reasonable inferences from them than to believe his subsequent recollection or version of it, particularly if he is a witness with a purpose of his own to serve and if it did not account for the statements in his documents and writings. Judicial reception of evidence requires that the oral evidence be critically tested against the whole of the other evidence and the circumstances of the case. Plausibility should never be mistaken for veracity* ...

In *Tindok Besar Estate Sdn Bhd v Tinjar Co* the Federal Court through the judgment of Chang Min Tat FCJ reiterated this principle as follows:

> In cases where conflicting evidence are presented before a court, it is the duty of the court not only to weigh such evidence on a balance of probabilities but it is also incumbent upon the court to look at all the surrounding factors and to weigh and evaluate contemporaneous documents that may tend to establish the truth or otherwise of a given fact. In this instance the learned trial judge discredited the evidence of the appellant, accepted the evidence of the respondents wholeheartedly and disregarded the contemporaneous documents totally. We say that he had erred as he had failed to direct his mind as to the probative effect of the contemporaneous documents. He should, after accepting the respondents' evidence, weighed it against the contemporaneous documents and evaluate whether such documents support the respondents' oral testimony ...

[66] As stated earlier, we were shown by the defendant's counsel that the single piece of documentary evidence adduced by the plaintiff to prove the deceased's income was exh P1 which purportedly showed the deceased's employer was VVRP Enterprise and his position was that of manager earning RM6,500 per month. However, exh P1 was converted to ID1 when the plaintiff admitted during cross-examination that the signature on P1 belonged to his wife and that the pay voucher was created supposedly to enable the deceased to obtain a housing loan. The plaintiff also admitted that there was no letter of appointment issued to the deceased by the two enterprises.

[67] The plaintiff himself admitted during cross-examination that ID1 did not show any deduction for SOSCO, EPF or income tax from the deceased's salary. He also admitted that the income tax returns of VRRP Enterprise and VRRP Plastic and Metal did not disclose the salaries of the deceased and his other workers and the combined monthly income of the two business enterprises was around RM10,000 to RM15,000 and yearly profit of the two enterprises was around RM60,000. We would therefore be more inclined to agree with the defendant that it was most unlikely for the two enterprises to be able or willing to pay the deceased a monthly salary which was more than half of their monthly income.

[68] The evidence of the defendant's witnesses, SD1, SD5, SD6 and SD8 through their investigations and interview with the plaintiff, SP2 and SD3 also showed that that the deceased's salary was paid in cash, he had no bank account and had never paid any income tax. The deceased also did not own a mobile phone or any vehicle and he lived in a rented house with a few others with the barest of necessities and he walked to his work place and moved around on a borrowed motorcycle. His job was to drive around in a lorry (presumably belonging to the plaintiff) to collect and or buy scrap metal and plastic materials earning a commission of between RM20 to RM30 daily. Could a person in the deceased's situation be a manager of the two enterprises and be earning a monthly salary of RM5,000 to RM7,000, as accepted by the learned trial judge?

[69] We entirely agreed with the defendant's counsel that in light of the factual matrix described above, the learned trial judge ought to have treated the evidence of the plaintiff with more caution than she did, considering that as the nominee under the polices he was a witness with a motive of his own to advance. She ought to have tested the veracity or credibility of the plaintiff's version which was based on his unsubstantiated bare oral testimony against the overall testimony of the defendant's witnesses and to ask herself the question which version was inherently probable or improbable.

[70] However, we noted the learned trial judge did not carry out any of the tasks stated above. Indeed, all that the learned trial judge said in her grounds of judgment on why she accepted SP1's oral evidence on the income of the deceased was as follows:

> Soalan 12. Soalan ini merujuk kepada gaji tahunan Simati. Dalam jawapan Simati meletakkan pendapatan antara RM72,000 hingga RM120,000 setahun.
>
> Fakta ini telah disahkan oleh keterangan SP1 majikan Simati yang menerangkan gaji Simati adalah di dalam Iingkungan RM5,000 hingga RM7,000 sebulan.
>
> Oleh itu, Mahkamah menolak hujah Defendan bahawa wujud kenyataan salah mengena gaji Simati di Borang Cadangan bagi membolehkan Defendan menolak polisi Simati.

[71] The learned trial judge also did not offer any explanation on why she could not accept the defendant's witnesses' testimony on the deceased's occupation status and income. While she dismissed the evidence of SD1 and SD5 (that there was a possible collusion between the deceased and the insurance agent (SD7) and the suspicious circumstances surrounding the accident which caused the deceased's death) as mere theories and suspicion, she however did not say why she could not accept their evidence with regard to the deceased's occupation status and income.

[72] Had the learned trial judge properly directed herself on the two versions placed before her, she would have come to a finding and conclusion that the plaintiff's version was obviously untenable or inherently improbable to be accepted.

[73] In conclusion, we held that the learned trial judge's finding that there was no inaccuracy or misstatement on the proposal form with regard to the deceased's occupation status and income was made with no or insufficient judicial appreciation of the entire body of evidence before her which rendered her finding plainly wrong to justify our appellate intervention to set them aside.

Did the learned trial judge commit an error of law in holding the basis clause did not apply in this case?

[74] This issue arose when the learned trial judge went on to accept the alternative argument of the plaintiff's counsel that even assuming that there was a misstatement or inaccuracy on the proposal form, the defendant as the insurer was nevertheless still not entitled to repudiate the polices because it failed to show through any of its witnesses how the answers on the deceased's occupation status or job description or the amount of his income were material to the risk insured.

[75] This finding is found in para 20 of her grounds of judgment which reads:

> Mahkamah bersetuju dengan hujahan alternatif Plaintif bahawa jika pun terdapat penyataan salah atau misrepresentation di dalam borang cadangan, pihak defendan masih tidak boleh menolak tanggungan mereka oleh sebab pihak defendan gagal untuk memberi keterangan bahawa job description atau gaji simati adalah satu perkara yang material bagi risiko yang diinsuranskan (material to the risk insured) bagi defendan dalam memutuskan menerima atau menolak borang cadangan simati.
>
> Berdasarkan keterangan yang diberi tidak ada mana-mana saksi defendan yang memberi keterangan mengenai kepentingan salah nyata atau bagaimana ianya memberi kesal kepada risiko yang diinsuranskan.
>
> Sebagai bukti bahawa ketinggalan mengisi bahagian gaji simati di borang cadangan adalah tidak material ialah apabila Allianz insurances telah mengisukan polisi personal accident sejumlah RM500,000. Walaupun bahagian pendapatan simati tidak diisi pihak Allianz juga setuju merekodkan penghakiman persetujuan dengan plaintif.

[76] Defendant's counsel submitted before us that in view of the law on a basis clause as laid down in *China Insurance Co Ltd v Ngau Ah Kau* and *American International Assurance Co, Ltd v Nadarajan a/l Subramaniam* as discussed earlier, the aforesaid finding of the learned trial judge was obviously an error of law which required appellate intervention. These authorities had clearly decided that where the policy is governed by a basis clause, it is not the court's function to inquire into the materiality of the answer. The answer to the question in the proposal form will be deemed material as the truth of the answer had been made a condition of the policy.

[77] The plaintiff's counsel, on the other hand, contended that the learned trial judge's finding is supported by the decision in the case of *Leong Kum Whay v QBE Insurance (M) Sdn Bhd & Ors* [2006] 1 MLJ 710; [2006] 1 CLJ 1 which reads as follows:

> [3] It is settled beyond dispute that a contract of insurance is one that imposes a mutual duty on the parties to it to act *uberrimae fides* towards each other. On the part of the insured, he or she must make full disclosure of all material facts. It is not for him or her to decide in his or her own mind what is material. It does not matter

A whether the insurer asks any questions of the insured. The duty is on the insured to make full disclosure of material is a question of fact. But the duty to make full disclosures of all material facts is not an implied term of a contract of insurance. There is in fact no contract at the point at which the duly arises; the parties being still at the stage of negotiations. It is therefore a pre-contractual duly, imposed by the B common law. There is a corresponding duty on the part of an insurer to act with utmost good faith towards its insured.

And further at p 20 para c:

The nature of the duty to make disclosure was also considered by Lord Jauncey of C Tullichettle in *Banque Financière de la Cité SA v Westgate Insurance Co Ltd* [1991] 2 AC 249 where he said:

> The duty of disclosure arises because the facts relevant to the estimation of the risk are most likely to be within the knowledge of the insured and the insurer therefore has to rely upon him to disclose matters material to that risk. The duty D extends to the insurer as well as to the insured: *Carter v Boehm* (1766) 3 Burr 1905; (1766) 97 ER 1162). *The duty is, however, limited to facts which are material to the risk insured, that is to say, facts which would influence a prudent insurer in deciding whether to accept the risk and, if so, upon what terms and a prudent insured in entering into the contract on the terms proposed by the insurer. Thus any facts which would increase the risk should be disclosed by the insured and* E *any facts known to the insurer but not to the insured, which would reduce the risk, should be disclosed supervening facts which come to the knowledge of either party after conclusion of the contract* (*Lishman v Northern Maritime Insurance Co* (1875) LR 10 CP 179), subject always to such exceptional cases as a ship entering a war zone or an insured failing to disclose all facts relevant to a claim.

F (See also *New India Assurance Co Ltd v Pang Piang Chong & Anor* [1971] 2 MLJ 34 at p 36 para F (left); *Toh Kim Lian & Anor v Asia Insurance Co Ltd* (1995) 3 AMR 2304; [1996] 1 MLJ 149 at p 2312).

G **[78]** Further in the case of *Pacific & Orient Insurance Co Sdn Bhd v Kathirvelu* [1992] 1 MLJ 249; [1992] 1 CLJ 251, which was decided 20 years after *China Insurance Co Ltd v Ngau Ah Kau* , the Supreme Court held that the defendant therein was not entitled to repudiate the policy on the ground of non-disclosure of material facts as it would be impossible for an insured to H answer all the questions correctly as the form with certainty. All that was required was that he answered it honestly.

[79] It was therefore submitted that *China Insurance Co Ltd v Ngau Ah Kau* must be deemed to have been overruled by *Pacific & Orient Insurance Co Sdn* I *Bhd v R Kathirvelu*.

[80] It was submitted that based on the authorities highlighted above, the duty of an insured (the deceased) to give a full and correct disclosure on the proposal form is limited to facts which are material to the risk insured, that is

to say, facts which would influence a prudent insurer in the position of the defendant in deciding whether to accept the risk and, if so, upon what terms.

[81] In this case, no evidence was adduced by the defendant to show that the deceased's occupation status and amount of his income was material and or it had influenced the acceptance of the proposal.

[82] The reason for this omission is as plain as pikestaff ie the misstatement or inaccuracy in the deceased's occupation status and his income was wholly immaterial nor did they have any bearing on the risk insured in relation to the policies taken out by deceased.

[83] This submission is supported by the evidence before this court that Allianz Insurance was prepared to issue a personal accident policy of RM500,000 to the deceased although the income column on his proposal form was left blank.

OUR ANALYSIS AND FINDING

[84] Having considered the submission of respective learned counsels, it is our considered opinion that, in the light of the legal position set out in *China Insurance Co Ltd v Ngau Ah Kau* and *American International Assurance Co, Ltd v Nadarajan a/l Subramaniam*, there was an obvious misdirection of law on the part of the learned trial judge on this issue.

[85] It bears repeating that these two authorities had clearly decided that where the policy is governed by a basis clause, it is not the court's function to inquire into the materiality of the answer. The answer to the question in the proposal form will be deemed material as the truth of the answer had been made a condition of the policy.

[86] We were unable to accede to the submission of the plaintiff's counsel that the case of *China Insurance Co Ltd v Ngau Ah Kau* had been overruled by *Pacific & Orient Insurance Co Sdn Bhd v R Kathirvelu*.

[87] In fact, the issue of whether *China Insurance Co Ltd v Ngau Ah Kau* had been overruled by *Pacific & Orient Insurance Co Sdn Bhd v R Kathirvelu* was specifically addressed by this court in *American International Assurance Co, Ltd v Nadarajan a/l Subramaniam* in answer to the same submission raised by counsel for the respondent in that case, in holdings 25–30 of the reported judgment which read as follows:

> [25] *Counsel for the respondent submitted that it was not in all cases of non-disclosure that an insurer could repudiate a policy. The non-disclosure had to be material and in*

support counsel relied on the Supreme Court case of Pacific & Orient Insurance Co Sdn Bhd v R Kathirvelu [1992] 1 MLJ 249; [1992] 1 CLJ 348; [1992] 1 CLJ Rep 251. *Counsel submitted that the learned judge was perfectly entitled to reject the appellant's contention on non-disclosure on the ground that the non-disclosure, even if it was true, was not material as the same did not, in any way, affect the nature of the policies, which in this case, were accident policies.*

[26] *In the Pacific & Orient case His Lordship Gunn Chit Tuan SCJ (as he then was) delivering the judgment of the court held that the court did not consider as a matter of fact that it was material for the plaintiff to have disclosed in the proposal form that he had early cervical spondylosis, haemorrhoids, labile hypertension or peptic ulcer as they are not serious diseases or illnesses of the same genus as those mentioned in an earlier question and that the defendant was not entitled to repudiate the policy on the ground of non-disclosure of material facts.*

[27] *Counsel for the respondent further submitted that in light of Pacific & Orient, which was decided 20 years later, the principle in China Insurance was no longer applicable.*

[28] We are of the view that firstly, the issue of whether there was a non-disclosure or incorrect disclosure or misrepresentation in an answer in the proposal form is a question of fact to be determined by the court and secondly, given the decision in *China Insurance*, it is not the court's function to inquire into the materiality of the answer. The answer to the question in the proposal form will be deemed material as the truth of the answer has been made a condition of the policy. *It will be noted that China Insurance was not considered by the Supreme Court in Pacific & Orient. It will be further noted that in Pacific & Orient it was a finding of the court made on the facts of that case that the non-disclosure was not material. In any event, in Pacific & Orient the court was not concerned with the 'basis clause' when concluding that the non-disclosure was not material whereas in the present case, the 'basis clause' was applicable to the contract of insurance entered into between the insured and the appellant. Accordingly the ratio in China Insurance will still be applicable. In short, the court with respect cannot agree with counsel for the respondent that Pacific & Orient has set aside the decision in China Insurance and that what is only material is the nature of employment of the insured and not the amount of his annual income.*

[29] It is observed that the learned trial judge did not consider the decision in *China Insurance* in his grounds of judgment although the same had been referred to by counsel for the appellant in his submission. If he had so considered perhaps he would have arrived at a different conclusion.

[30] The court was satisfied that the appellant had in the circumstances discharged its burden of proving the allegation of non-disclosure or incorrect disclosure of a material fact in the proposal form (see *Azizah bte Abdullah v Arab-Malaysian Eagles Sdn Bhd* [1996] 5 MLJ 569; [1996] 3 CLJ 426).

[88] Likewise, in the present case we were satisfied that the defendant had in the circumstances discharged its burden of proving the allegation of false or

incorrect disclosure relating to the deceased's occupation status and his income in the proposal form which would entitle the defendant to repudiate the polices issued to the deceased.

Observation on the plaintiff's conduct as a nominee

[89] Before we leave this judgment, we thought it appropriate to address the submission of defendant's counsel that the plaintiff was not a credible witness and had come to court with unclean hands in order to reap unjust enrichments as a nominee under the policies.

[90] This issue arose because it surfaced from his testimony during cross examination that, in pursuing his claim against the three companies, the plaintiff went on the basis that he was the *waris* (beneficiary) of the deceased and as such was entitled to all the monies payouts under the policies and could use the monies as he pleased.

[91] This however is not what ss 166 and 167 of the Insurance Act envisaged. Sections 166 and 167 read as follows:

> 166(1) *A nomination by a policy owner*, other than a Muslim policy owner, *shall create a trust in favour of the nominee of the policy moneys payable upon the death of the policy owner, if —*
>
> (a) the nominee is his spouse or child; or
>
> (b) where there is no spouse or child living at the time of nomination, the nominee is his parent.
>
> (2) Notwithstanding any written law to the contrary, *a payment under subsection (1) shall not form part of the estate of the deceased policy owner or be subject to his debts.*
>
> (3) ...
>
> (4) ...
>
> (5) ...
>
> 167(1) *A nominee, other than a nominee under subsection 166(1), shall receive the policy moneys payable on the death of the policy owner as an executor and not solely as a beneficiary and any payment to the nominee shall form part of the estate of the deceased policy owner and be subject to his debts* and the licensed insurer shall be discharged from liability in respect of the policy moneys paid.
>
> (2) ...

[92] It was obvious that the plaintiff, who had no familial ties whatsoever with the deceased, falls under sub-s (1) of s 167, which makes him an executor and not solely a beneficiary of the deceased's estate and any payout under the policies shall form part of the estate of the deceased, and shall be subject to his debts.

[93] In his evidence elicited during his cross examination, the plaintiff admitted he had used some of the money paid out under the consent judgments with Allianz and Maybank Takaful and that he made no effort to trace the mentally ill brother or any other living relatives of the deceased. He claimed that he intended to settle the deceased's outstanding debts, but admitted he had no idea whether the deceased even had any outstanding loan. He also claimed he would like to use the payouts under all the policies to build an old folks' home in memory of the deceased, not realising that as an executor he could not use the money at his whim and fancy.

[94] While s 167(1) discharges a licensed insurer from liability in respect of the policy moneys paid, it does not discharge the plaintiff as an executor of the deceased's estate whose duties are governed by the Probate and Administration Act 1959.

[95] It would also appear from the notes of proceedings that the plaintiff was less than forthright on how he came to be named as a nominee under the polices. He claimed that he was not aware that the deceased and his other workers had named him as the nominee in the respective policies, and that he only knew that he was a nominee under the policies after the deceased's death upon being informed by the insurance agent. This was in marked contrast to the testimony of SD2 who had testified that he had sold policies to the plaintiff's four other workers and that in each case the plaintiff played a pivotal role when it came to procuring facts and figures to be inserted into the policies, that he paid the initial premiums on their behalves and had insisted that he be made a nominee in all the policies and that the polices upon being issued were handed over to the plaintiff.

[96] It does sound macabre but an interesting question to ask: was the plaintiff actually wagering on the lives of his workers as a form of investment in the hope of reaping a hefty reward in the event of their death? In the case of the deceased, it would appear to be so for within a short period of two months after the issuance of the policies he passed away in a road accident and the plaintiff as the nominee stood to gain RM1,416,000, not to mention the payouts from Allianz and Maybank Takaful of RM250,000 + RM75,000 respectively under the consent judgments. We therefore agreed with the defendant's counsel that by all accounts it did appear that the plaintiff was not a person who had come to court with clean hands.

DECISION AND ORDERS

[97] For the reasons stated above, we allowed the appeal and set aside the decision and order of the High Court. We awarded agreed costs of RM30,000 to the defendant and also ordered the deposit to be refunded.

Appeal allowed.

Reported by Ashok Kumar